CRIMINAL PROCEDURE

Amendment to Criminal Pleadings

The defendant was charged with unlawfully engaging in a game of chance for money, in violation of a municipal ordinance, "at 112 Superior street . . ." At the conclusion of the evidence for the city, the trial court permitted the prosecutor to amend the affidavit whereby the charge was preferred to include therein the words "also 114-116-118-120 Superior St." To this the defendant objected. The affidavit was not reverified, nor was defendant arraigned upon it, nor did he plead to it, as amended. Without offering any evidence, the defendant rested and moved for a directed verdict, which motion was overruled, and the court, (trial by jury having been waived), found the defendant guilty and imposed sentence. Defendant appealed and the judgment was affirmed, the Court of Appeals holding that, although a court is powerless to amend an affidavit charging a crime in a pending criminal proceeding, the amendment attempted was not prejudicial to the defendant, and therefore, under the provisions of Ohio Gen. Code 13449-5, it did not constitute reversible error. *City of Toledo* v. *Harris*, 56 Ohio App. 251, 10 N.E. (2d) 454, 9 Ohio Op. 356 (1937).

The court was confronted with two statutory enactments providing for amendment of indictment and information in certain instances[1] but disposed of these obstacles by invocation of the "*expressio unius*" doctrine, saying that the express stipulations with regard to indictment and information indicated a purpose not to extend such power as to affidavits. The theory of the court in denying the right to amend was expressed in

[1] Ohio Gen. Code 13433-2: "Upon examination of the charge, the court or magistrate shall have the power to amend the warrant or information to conform to the facts and the evidence, provided the amendment shall not change the nature of the crime."

Ohio Gen. Code 13437-29: "The court may at any time before, during or after the trial amend the indictment, information or bill of particulars, in respect to any defect, imperfection or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. If any amendment be made to the substance of the indictment or information or to cure a variance between the indictment or information, and the proof, the accused shall on his motion be entitled to a discharge of the jury, if a jury has been impaneled, and to a reasonable continuance of the cause, unless it shall clearly appear from the whole proceedings that he has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that his rights will be fully protected by proceeding with the trial, or by a postponement thereof to a later day with the same or another jury. In case a jury shall be discharged from further consideration of a case under this section, the accused shall not be deemed to have been in jeopardy. No action of the court in refusing a continuance or postponement under this section shall be reviewable except after motion to and refusal by the trial court to grant a new trial therefor, and no writ of error or other appeal based on such action of the court shall be sustained, nor reversal had, unless from consideration of the whole proceedings, the reviewing court shall find that the accused was prejudiced in his defense or that a failure of justice resulted."

the following: "An affidavit is sponsored by an individual. It must be sworn to by him. To change his sworn statement and make him say under oath something he has not said, and might be unwilling to say, would indeed be a dangerous procedure."

The question of amendment of criminal pleadings is steeped in an historical background as old as Anglo-American freedom, and to fully understand the perplexities confronting the courts today, it is necessary to look to the origins of the grand jury system and the fundamental concepts underlying its inception. The grand jury arose primarily as a bulwark against aggression by the King and to the present day has retained a character essentially defensive. The crown has always enjoyed the right of instituting criminal prosecutions, and the abuse of this prerogative by the Stuart kings was one of the principal reasons for the jealous exercise by the king's subjects of their rights based on the principle stated in the Magna Carta, (1215), that a freeman cannot be deprived of life, liberty, or property except by the "lawful judgment of his peers." Herein was elucidated the basic thought upon which our theories regarding the necessity of a formal accusation as essential to a trial for crime were evolved. At common law the requirement was met by evolution of the indictment and the information, the former then lying for all treasons, felonies, or misdemeanors, for statutory as well as common law crimes, (Clarke, Crim. Proc. 2d ed. 124), the latter only for misdemeanors. Moreover, an indictment was necessary for the prosecution of any crime above a misdemeanor, "for it is the policy of the common law that no man shall be put upon his trial for felony until the necessity therefor has been determined by a grand jury on oath." (Clark, Crim. Proc. 2d ed. 125; 1 Chitty Cr.L. 844; 2 Hale P.C. 151; 4 Bl. Comm. 310; 2 Hawk. P.C. c. 26, sec. 3; *Com.* v. *Barrett*, 9 Leigh (Va.) 665 (1839). Conversely, no felony could be prosecuted by information. *State* v. *Town of Dover*, 9 N.H. 468 (1838).

Upon the withdrawal of the American colonies from the Empire, many of these tenets were carefully preserved in our own jurisprudence. The colony of Virginia steadfastly refused to ratify the Constitution until it was assured that a Bill of Rights would be incorporated therein, and thus we find that document reciting that "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person * * * be deprived of life, liberty, or property, without due process of law." (U. S. Const., Am. Art. V.) This provision does not, however, operate as a limitation upon, or restric-

tion of the criminal procedure of the several states. *Stockum* v. *State*, 106 Ohio St. 249, 139 N.E. 855 (1922), approving and following *Prescott* v. *State*, 19 Ohio St. 184 (1869). Consequently, similar provisions have been enacted into the constitutions of nearly all of the states. Prior to the Constitution of 1851, Ohio required petit larceny and like offenses to be prosecuted by indictment, *Cole* v. *State*, 29 Ohio St. 226 (1876), but, by the Constitution of 1851 the Legislature was authorized to dispense with indictment in "cases of petit larceny and other inferior offenses," *Cole* v. *State*, *supra*, and presently the Ohio Constitution (1851-1912) Art. I, sec. 10, provides: "Except in cases of impeachment, cases arising in the army or navy, or in the militia when in actual service in time or war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital or otherwise infamous, crime, unless on presentment or indictment of a grand jury . . ."[2] These constitutional stipulations vary from state to state as to the degree of crime triable only on indictment. There seem to be three prominent classifications, *viz.*, (1) indictment required for a "capital or otherwise infamous crime," as in Ohio; (2) indictment necessary wherever indictment will lie; and (3) indictment necessary only where the offense is punishable by death or life imprisonment. (Clark, Crim. Proc. 2d ed. 126.) Other lesser degrees of variation exist among the individual charters. (A.L.I., Code of Crim. Proc., Tent. Draft No. 1, p. 324, *et seq.*) Thus, where the constitution of the particular state does not require indictment, it is competent for the legislature to provide for the prosecution of all offenses, even capital, by information. Some states have so done, and in these jurisdictions it has been held that the "due process" clause of the Constitution of the United States, (Am. Art. V, and Am. Art. XIV), is not violated by the abolition of the grand jury system and indictment, "provided some other formal and sufficient mode of accusation, as by information, is substituted." *Maxwell* v. *Dow*, 176 U. S. 581, 20 Sup. Ct. 448, 44 L. Ed. 597 (1900); *Hurtado* v. *California*, 110 U. S. 516, 28 L. Ed. 232,

[2] By Art. I, Sec. 10, the framers of the Ohio Const. left proceedings as to lesser offenses to the discretion of the Legislature. *Dillingham* v. *State*, 5 Ohio St. 280, 21 Ohio Jur. 683, sec. 9. In discharge of this authority Section 13437-34 of the Gen. Code was enacted, providing that, "In prosecutions for misdemeanor in the court of common pleas, indictment by the grand jury shall not be necessary, but such prosecution may be upon information filed and verified by the prosecuting attorney of the county, or by affidavit when such method is by statute especially provided. . . . "

In Ohio the information must be founded upon a warrant issued charging the person informed against with the commission of the crime. *Eichenlaub* v. *State*, 36 Ohio St. 140 (1880); *Weisbrok* v. *State*, 50 Ohio St. 192, 33 N.E. 603 (1893); *Kubach* v. *State*, 2 O.C.C. (N.S.) 133, 5 O.C.D. 488 (1904); *Oberer* v. *State*, 8 O.C.C. (N.S.) 93, 8 O.C.D. 620 (1904).

4 Sup. Ct. 111, Dissent 292 (1884). But, despite this, no state has, as yet, abolished the grand jury.[3] Thus, presently, the necessity for a formal accusation remains ingrained in our criminal law, and so strongly, in fact, that the courts with unanimity hold that jurisdiction to proceed with trial for crime cannot be acquired otherwise, no even by consent of the accused.[4] *Ex parte Bain*, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849 (1887); *People* v. *Campbell*, 4 Parker Cr. R. (N. Y.) 386 (1859.)

The restriction against amendment of criminal pleadings seems to have had its basis in humanitarian instinct. "A century and a half ago considerably over a hundred offenses were punishable by death in England, and a vigorous strictness in the framing of indictments arose in that country, from the humane tendency of the judges to seize on any flaw in the indictment when a life might thereby be saved." (7 A.L.R. 1516). However, the fundamental distinction between indictments and informations operated to cause the courts to distinguish between the relative amendability of each. Thus, at common law, an indictment, being dependent for its validity upon the finding of the grand jury on oath, was not amendable, and this was so whether the offense charged was a felony or a misdemeanor.[5] *Rex* v. *Wilkes*, 4 Burrows, 2527 (1770); *People* v. *Campbell, supra*; *Ex parte Bain, supra.* On the other hand, at common law an information could be amended by the prosecuting officer at any time by leave of court[6]. *State* v. *Weare*, 38 N. H. 314 (1859); *State* v. *White*, 64 Vt. 372, 24 Atl. 250 (1892); *Rex* v. *Wilkes, supra.* There seems to be no question at the present day that this rule as to amendment of informations has not been rendered more stringent, and that informations are more or less easily amendable in all jurisdictions where they are used as a method of accusation. *People* v. *Henssler*, 48 Mich. 49, 11 N.W. 804 (1882); *Attorney-General* v. *Henderson*, 3 Anstr. 714, Eng. Exch. (1796). Amend-

[3] For discussion and summarization, see A.L.I., Code of Crim. Proc., Tent. Draft No. 1, p. 57.

[4] "The charge as made, being a felony, the Constitution of this State requires the presentment or indictment of a grand jury as a prerequisite to trial; and, if the pleading they file with the court could be remodeled by stipulations between the counsel, the defendant would not be tried upon the presentment of the grand jury, but rather upon the consent of counsel. This court cannot acquire jurisdiction to try an offense by consent, nor can its jurisdiction over an offense be changed by consent so as to embrace any other than that presented by the grand jury, where the action of that body is requisite." *People* v. *Campbell, supra.*

[5] The question of prior consent given by the grand jury to the court to amend the indictment as to matters of form, although a related subject, is not discussed in this note as not presenting the same questions, and not being of the same practical significance.

[6] "An officer of the crown has the right of framing them [informations] originally, and may, with leave, amend, in like manner as any plaintiff may do. If the amendment can give occasion to a new defense, the defendant has leave to change his plea." Lord Mansfield, in *Rex* v. *Wilkes, supra*, at 2569.

ment can be effected after trial has begun, *State* v. *Stebbins*, 29 Conn. 463, 79 Am. Dec. 223 (1861), and may include both matters of form and matters of substance. *State* v. *Barrell*, 75 Vt. 202, 54 Atl. 183, 98 Am. St. Rep. 813 (1903). In this latter case it was held that the amendment could be made by the prosecutor's successor in office, which holding is entirely consistent with the established view that the information is filed by the prosecutor in his official, rather than individual, capacity. *Rex* v. *Wilkes*, *supra*.

The most troublesome problem *re* amendments is that involving indictments. In ascertaining the present state of the law relative to amendment of indictments it is necessary to make a primary distinction between matters of form and those of substance. As a broad generality it may be said that the former are amendable, and the latter are not. (Clark, Crim. Proc. 2d ed. 365.) However, as is true of the majority of sweeping statements, this assertion is not entirely accurate. In the great majority of American jurisdictions and in England, statutes have been enacted which, in varying degree, authorize the courts to amend the pleadings of the prosecution,[7] and generally, in their absence, no amendment is possible. However, it is almost universally recognized that the caption may be amended, regardless of the statute. *State v. Moore*, 1 Ind. 548 (1849), permitting insertion of "oath" where omitted after "upon our . . .;" *Hightower* v. *State*, 73 Tex. Cr. Rep. 258, 165 S.W. 184 (1914), and *State* v. *McCarty*, 2 Pinney (Wis.) 513, 54 Am. Dec. 150 (1850), each permitting incorporation of the term of court, as a matter of form, where omitted. That this was the rule in Ohio prior to the enactment of any statute see *State* v. *Smith*, Tappan (orig.) 261, (rep.) 229 (1818), wherein the court permitted amendment of the date to conform with the facts, and *Smith* v. *State*, 4 Dec. Rep. 48, Clev. L. Rec. 62 (1855), holding that insertion of the

[7] See A.L.I. Code of Crim. Proc., Tent. Draft No. 1, p. 489 *et seq.*, for discussion and summarization of various statutory provisions.

Legislative enactment has provided Ohio with five statutory provisions authorizing amendment of criminal pleadings of various types in different particulars. Section 13437-29, the widest in scope of these sections, permits amendment as to either form or substance, by the court, of indictment, information or bill of particulars, in respect to any defect, imperfection or omission in form or substance, at any time before, during or after the trial, but expressly prohibits amendment as to name or identity of the crime charged. Section 13437-27 provides that "If the court be of the opinion that the third defect [uncertainty] exists in the indictment or information, it may order that the indictment or information be amended to cure such defect, provided, no change is to be made in the name or identity of the crime charged." Section 13437-34 states that "The provisions of law as to form and sufficiency, *amendments*, objections and exceptions to indictments * * * shall apply to such informations." Section 13433-2 permits amendment by the court or magistrate, of warrants or informations, "to conform to the facts and the evidence, provided the amendment shall not change the nature of the charge." Section 13433-3 permits a changing of the grade of the offense from misdemeanor to felony, or vice versa, by the court or magistrate. Other corollary sections are 13437-7 and 13449-5.

term of court is an immaterial amendment and one not affecting the validity of the indictment. *Contra, Cruiser* v. *State,* 18 N.J.L. 206 (1841), in the absence of statute. However, the caption is not generally considered a part of the indictment, so this does not impliedly authorize further amendment. (Clark, Crim. Proc. 2d ed. 158). Other amendments, as a rule, are dependent upon statute for their permissibility.

Although in *Lasure* v. *State,* 19 Ohio St. 43 (1869), a misnomer of the accused was held amendable in the absence of statute, the general view is that such amendment is not permissible save under an enabling statute. *People* v. *Carroll,* 39 Cal. App. 654, 180 Pac. 49 (1919), upholding an amendment striking out the name of a third person incorporated through typographical error into the indictment, and inserting the name of the accused.[8] Thus, under statute authorizing amendment as to matters of form, it has been held permissible to amend the name of the victim, in an indictment for homicide, to conform with the facts. *Davis* v. *State,* 150 Miss. 797, 117 So. 116 (1928), permitting amendment both as to Christian name and surname; *State* v. *Champagne,* 160 La. 47, 106 So. 670 (1925), with the proviso that the identity of the victim could not be changed, identity being a matter of substance. See also, *Wilkinson* v. *State,* 77 Miss. 705, 27 So. 639 (1900), wherein amendment was permitted to indicate an infanticide, the particular code provision permitting amendment to remedy variances in descriptions and names of victims of the crime committed by the accused.[9] Similarly, amendments correcting misnomers of the owners of property have been upheld in numerous instances. *Abney* v. *State,* 20 Ohio L. Abs. 296, 7 Ohio Op. 337 (1935), holding that under statute,[10] amendment of indictment charging theft of an automobile by changing the statement of ownership to include the equitable as well as the legal owner, is not prejudicial error; *People* v. *Richards,* 44 Hun, 278, 5 N. Y. Crim. Rep. 355 (1887), indictment for burglary; *Collier* v. *State,* 154 Miss. 446, 122 So. 538 (1929), and *People* v. *Herman,* 45 Hun, (N. Y.) 175 (1887), indictment for larceny; *State* v. *Luce,* 194 Iowa 1306, 191 N.W. 64 (1922), indictment for breaking an entering to commit larceny; *Graves* v. *State,* 148 Miss. 62, 114 So. 123 (1927). And, misnomers of injured persons other than victims of homicide or owners of property have been held properly amendable. *People* v. *Castaldo,* 146 App. Div. 767, 131 N.Y.S. 545 (1911), victim, in indictment for felonious assault; *State* v. *Haapanen,* 129 Me. 28, 149 Atl. 389

[8] By virtue of sec. 1008, Deering Cal. Penal Code (1931).
[9] 1892 Miss. Code, sec. 1435.
[10] Ohio Gen. Code, 13437-29, *supra.*

(1930), purchaser inserted, in indictment for unlawful sale of intoxicating liquors.

The date of the offense is generally regarded as a matter of form, and as such is amendable under statutory authorization. *People* v. *Lewis*, 132 App. Div. 256, 116 N.Y.S. 893 (1909); *Washington* v. *State*, 152 Miss. 154, 118 So. 719 (1928), indictment for possession of a still. But, where time is of the essence of the crime, it is a matter of substance, and not amendable. *State* v. *Faulks*, 97 N.J.L. 408, 117 Atl. 476 (1922).

Amendment of the description of the offense is more rigorously restricted, but the majority view permits such procedure insofar as the defendant's defense on the merits is not prejudiced thereby. *State* v. *Foxton*, 166 Iowa 181, 52 L.R.A. (N.S.) 919, 147 N.W. 347, Ann. Cas. 1913E, 727 (1914), permitting such amendment, where the indictment was for obtaining money under false pretenses, but stipulating that the nature or degree of the crime cannot be changed; *People* v. *Bellamy*, 79 Cal. App. 160, 248 Pac. 1042 (1926), pointing out that the amendment must be unquestionably as to form; *State* v. *Riddle*, 324 Mo. 96, 23 S.W. (2d) 179 (1929), permitting amendment to incorporate in the indictment the necessary formal words of the statute; *State* v. *Foster*, 56 Ohio App. 267, 10 N.E. (2d) 786, 23 Ohio L. Abs. 278, 9 Ohio Op. 363 (1936), permitting amendment to insert the word "motor" before "truck" where the charge was driving a motor vehicle while intoxicated, in order to put the indictment in the words of the statute. And an amendment of the description of property involved is usually permitted as a matter of form. *People* v. *Cockrill*, 62 Cal. App. 22, 216 Pac. 78 (1923), affirmed in 268 U.S. 258, 69 L. Ed. 944, 45 Sup. Ct. Rep. 490 (1925). So too, more clerical errors are invariably held amendable. *Dedge* v. *State*, 28 Ga. App. 558, 112 S.E. 155 (1922); *State* v. *Donato*, 106 N.J.L. 397, 148 Atl. 776 (1930). And, in *Pierpont* v. *State*, 49 Ohio App. 77, 17 Ohio L. Abs. 315, 2 Ohio Op. 240, 195 N.E. 264 (1934), the court held that, under Gen. Code 13437-29 it was not prejudicial error to insert the words "true bill" over the signature of the grand jury foreman, where they had been omitted by inadvertence. But the defendant may not be surprised by an amendment. *People* v. *Scanlon*, 132 App. Div. 528, 117 N.Y.S. 57 (1909).

Although, as has been seen, amendment is customarily permitted as to matters of form under numerous statutory provisions authorizing such steps, this is not so where matters of substance are involved. Although the statutes are plentiful permitting amendment as to formal matters,[11]

[11] See A.L.I., Code of Crim. Proc., Tent. Draft No. 1, p. 489 *et seq.*

only one, that enacted in Ohio,[12] expressly authorizes amendment of matters of substance. However, at this point the crux of the problem does not concern primarily the amendability of matters of substance, but rather the distinction between matters of form and matters of substance. In this regard one court has remarked that "A nice critic might insist that form is substance in criminal pleading." *U. S.* v. *Jackson,* 2 Fed. 502, 504. But the courts do not so hold. Another court propounded the following: "In general, I think it may be laid down that the statement of every fact necessary to be proven to make the act complained of a crime, is matter of substance in an indictment . . ." *State* v. *Amidon,* 58 Vt. 524, 2 Atl. 154, 6 Am. Crim. Rep. 41 (1885). Clark states that "No omission or misstatement which prevents the indictment from showing on its face that an offense has been committed or from showing what offense it intended to be charged, is mere matter of form. It is matter of substance, and cannot be cured by amendment at the trial." (Clark, Crim. Proc. 2d ed. 365.) From these definitions it is manifest that miswriting, missspelling, false or improper English, and the like, are not matters of substance. There are, however, certain matters which are fairly consistently catalogued as substance and as such not amendable. Prominent among these are those facts concerning the identity of the injured person. "Amendment of indictment by substituting therein the name of another person as the one injured, when working a change of identity, is an amendment in substance which the courts are not authorized to make." (68 A.L.R. 928, 936.) Thus, where it appears that the name mistakenly alleged as the owner of property, in an indictment for larceny, is in fact that of an existing person in the jurisdiction, no amendment will be permitted, as working a change in identity. *Blumenberg* v. *State,* 55 Miss. 528, 3 Am. Crim. Rep. 284 (1878). A New Jersey court went so far as to remark that the allegation of ownership is essential to an indictment for larceny, and that any change of the allegation setting forth the name of the owner of the property alleged to have been stolen would be an amendment in substance, and not permissible. *State* v. *Cohen,* 105 N.J.L. 529, 147 Atl. 325 (1929). And, in *State* v. *Morgan,* 35 La. Ann. 1139 (1883), it was held, where the indictment was for rape, that it was error to permit substitution of the name of the actual victim in the stead of the name erroneously inserted, such interchange being highly prejudicial to the defendant as effecting a change in identity.

Although time is ordinarily a matter of form, it can, in various instances, be one of substance. As in *State* v. *Faulks, supra,* where the

[12] Ohio Gen. Code 13437-29. See note 1 *supra.*

indictment for carnal abuse clearly showed the complainant to be over sixteen years of age at the time of the offense. Amendment to place the girl's age as less than sixteen was denied on the ground that it would change the nature of the offense from fornification to carnal abuse. Again, in *State* v. *Sing Lee*, 94 N.J.L. 266, 110 Atl. 113 (1920), an amendment seeking to insert as additional matter, other dates than the date specified was denied on the ground that it would multiply the offense, the indictment charging but one. But, in *People* v. *Clum*, 213 Mich. 651, 182 N.W. 136, 15 A.L.R. 253, (1921), it was held not error to permit the amendment, at the trial, of an indictment charging the sale of stock without a license on a specified date so as to charge that the sales were on the date specified and divers other dates. So, in indictments for burglary it is customarily held that omission of the allegation "in the night time" is fatal and irremediable by amendment, *Dickson* v. *State*, 20 Fla. 800, 5 Am. Crim. Rep. 297 (1884), although, as before seen, alteration as to day, month, or year, is commonly allowed, *State* v. *Johnson*, 35 La. Ann. 842 (1883), the materiality of the former allegation being the distinguishing feature. However, the date of commission of an offense may be a matter of substance where such allegation is required by the statute defining the crime; *Kirkendall* v. *State*, 78 Texas Cr. Rep. 168, 180 S.W. 676 (1915), wherein the defendant was charged with abandonment of his wife, and the omitted allegation was held incurable by amendment. But Texas is inclined to view time as a matter of substance regardless. *Kirkendall* v. *State*, *supra*.

Clearly the nature of the offense is a matter of substance, and here the courts are unanimous in refusing to countenance any alteration which will effect a change in the nature of the crime charged, on the basis of fact that such amendment would be extremely prejudicial to the accused and an infringement upon his constitutional right to presentment or indictment by a grand jury. Thus, an indictment not legally charging an offense cannot be amended. *People* v. *Millsap*, 85 Cal. App. 732, 260 Pac. 378 (1927). Accord, *Iannaci* v. *State*, 44 Ohio App. 228, 184 N.E. 843, 13 Ohio L. Abs. 541, 37 Ohio L.R. 469 (1933). Here the indictment was for rape and the court ruled that it could not amend an indictment so as to change the identity of the crime, saying that an amendment whereby the essentials of a crime are supplied by insertion of the words "unlawful," and "forcibly and against her will" which were lacking in the original indictment, is inadmissible

under Ohio Gen. Code 13437-29.[13] Nor may the nature of the offense be changed by amendment. *Rex* v. *Voll*, 48 Ont. L. Rep. 437, 57 D.L.R. 440 (1920); *Com.* v. *Snow*, 269 Mass. 598, 169 N.E. 542 (1930); *Kemp* v. *State*, 121 Miss. 580, 83 So. 744 (1920). Thus, where the prosecutor attempted to strike out a clause to reduce the crime charged from murder to manslaughter, the New York court thwarted the effort, holding that, were the amendment permitted, the indictment would no longer be that of a grand jury, and prosecution thereon would violate the Fifth Amendment of the United States Constitution.[14] *People* v. *Motello*, 157 App. Div. 510, 142 N.Y.S. 622 (1913). But see *State* v. *Doucet*, 177 La. 63, 147 So. 500 (1933), permitting a charge of murder to be reduced to manslaughter, on motion made in open court in the presence of the defendant, without formal amendment. And, where the indictment charges too many crimes, it is competent to strike out all but one where the accused is not thereby prejudiced. *State* v. *Clement*, 80 N.J.L. 669, 77 Atl. 1067 (1910); *State* v. *Lamb*, 81 N.J.L. 234, 80 Atl. 111 (1911); *Com.* v. *Smith*, 24 Pa. Dist. Rep. 936 (1914). But an indictment may not be amended to permit a trial upon a crime not charged by the grand jury, albeit a crime is charged in the indictment. *People* v. *Bogdanoff*, 254 N. Y. 16, 171 N.E. 890 (1930). The courts are in accord that an essential allegation omitted cannot be supplied by amendment. *Iannaci* v. *State*, *supra*; *Com.* v. *Cooper*, 264 Mass. 378, 162 N.E. 733 (1928), wherein the requisite averment, "wilfully and maliciously," was held not properly supplied by amendment to an indictment for arson.

Where the venue is not properly shown the indictment is fatally defective according to *State* v. *Armstrong*, 4 Minn. 335 (1860), wherein the court commented that to permit amendment of an indictment not disclosing the jurisdiction of the court would be to hold the accused otherwise than on the indictment of a grand jury, and would be prejudicial

[13] A dissenting opinion cited *People* v. *Spence*, 250 Mich. 573, 231 N.W. 126 (1930) construing the Michigan statute (Comp. Laws 1929, sec. 17290). However, the Michigan case concerned amendment of information to charge an offense before a jury was impaneled, and this amendment was allowed.

The source of section 13437-29, *supra*, is Michigan Public Acts 1927, p. 315, sec. 76 (Comp. Laws 1929, sec. 17290). This statute was in turn based upon prior Michigan statutes, among them Sec. 11 of Act 77, 1855), permitting amendment as to form. This latter statute was held constitutional in *People* v. *Meyer*, 204 Mich. 331, 169 N.W. 889 (1918), but the constitutionality of sec. 17290, *supra*, has not as yet been fully tested, although it has been declared constitutional in *People* v. *Sims*, 257 Mich. 478, 241 N.W. 247 (1932).

[14] But see *Stockum* v. *State*, 106 Ohio St. 249 (1922); *Prescott* v. *State*, 19 Ohio St. 184 (1869); *Maxwell* v. *Dow*, 176 U.S. 581, 20 Sup. Ct. 448, 44 L. Ed. 597 (1900); *Hurtado* v. *California*, 110 U.S. 516, 28 L.Ed. 232, 4 S.Ct. 111 (1884), and numerous other authorities, holding that the Fifth Amendment to the Federal Constitution does not control the criminal procedure of the several states.

to him. Accord: *State* v. *Chamberlain*, 6 Nev. 257 (1871); *State* v. *Kelly*, 66 N. H. 577, 29 Atl. 843 (1891); *State* v. *Blakeney*, 33 S. Car. 111, 11 S.E. 637 (1890). *Contra: Breinig* v. *State*, 124 Ohio St. 39, 176 N.E. 674, 33 Ohio L.R. 649, 9 Ohio L. Abs. 333 (1930),[15] and *Welty* v. *Ward*, 164 Ind. 457, 73 N.E. 889, 3 Ann. Cas. 556 (1905).

In the Federal courts the doctrine of "no amendment" prevails by virtue of strict interpretation of the Fifth Amendment. Thus, the cases decided by those courts are, by and large, a reiteration of the early common law doctrine. *Ex parte Bain*, 121 U. S. 1, 30 L. Ed. 849, 7 Sup. Ct. Rep. 781, 6 Am. Crim. Rep. 122 (1886); *U. S.* v. *Dembowski*, 252 Fed. 894 (1918); *Dodge* v. *U. S.*, 169 C.C.A. 316, 258 Fed. 300 (1919); *Stewart* v. *U. S.*, 12 Fed. (2d) 524 (1926); *U. S.* v. *Libby, McNeill & Libby*, 7 Alaska 356 (1925), all relying on U. S. Const., Am. Art. V.

One State, Alabama, stands apart from the rest in its administration of this problem. The statute there provides for amendment of indictment, etc., "with the consent of the defendant," and this has been construed to mean no amendment without his consent. *Gregory* v. *State*, 46 Ala. 151 (1871), extending this rule to even the amendment of the caption; *Johnson* v. *State*, 46 Ala. 212 (1871); *Jackson* v. *State*, 21 Ala App. 284, 107 So. 725 (1926); *Dix* v. *State*, 8 Ala. App. 338, 62 So. 1007 (1913). But where defendant consented, amendment was permitted as to matters of form in *Ross* v. *State*, 55 Ala. 177 (1876), and Reynolds v. *State*, 92 Ala. 44, 9 So. 398 (1891).

In all instances enabling statutes of the various jurisdictions must be considered and construed in connection with, and subject to, the constitutional provisions of the particular state. With respect to those states authorizing amendment as to matters of form, the weight of authority, as shown by the citations throughout this discussion, is that they are constitutional. However, some statutes are, *prima facie*, broad enough to include matters of substance, as well as those of form, and it is with respect to such statutes that the most imporant consideration must be given. In 1877 the New Jersey court said: "It is plain that the legislature cannot constitutionally authorize an amendment in substance which will change an indictment found by a grand jury." *State* v. *Startup*, 39 N.J.L. 423. Accord, under a statute permitting amendment as to form or substance apparent on the face of the indictment, *State* v. *Twining*, 71 N.J.L. 388, 58 Atl. 1098 (1904). So, in *Com.* v. *Snow*, *supra*, under a statute broad enough to include both matters of

[15] Under Ohio Gen. Code 13437-29, *supra*.

form and substance within its provisions authorizing amendment,[16] the Massachusetts court held that there could be no amendment as to matters of substance; that the statute must be construed in the light of the constitution of that state, and, *a fortiori* must be restricted to provide for amendment of matters of form, and not substance. These expressions are in full accord with the majority view. In *People* v. *Foster*, 243 Pac. 667, 198 Cal. 112 (1926), the court limited the operation of the California code provision to extend only to matters of form, and held it, as so limited, constitutional.[17] See also, *People* v. *Sims*, 241 N.W. 247, 257 Mich. 478 (1932), holding the Michigan statute,[18] from which our Ohio enabling act was derived, constitutional, insofar as it authorizes amendment of matters of form. The principal Ohio statute[19] is, however, broader in its expression than that of any other jurisdiction. It expressly authorizes amendment as to matters of substance, but, to counterbalance this power, requires that the defendant be not misled or prejudiced, and that the identity or nature of the crime be not changed. The leading Ohio case passing upon this section is *Breinig* v. *State, supra*, which held that under Section 13437-29 the court is permitted to amend an indictment by inserting the venue of the offense where it is not stated, providing the defendant is not prejudiced; and further held that the provision in question is constitutional in permitting amendments both as to form and substance, with the qualifications afore-mentioned. But, in *Harris* v. *State*, 125 Ohio St. 257, 181 N.E. 104, 36 Ohio L.R. 328 (1932), the court ruled that omission of an essential element of a crime from an indictment cannot be cured by amendment, as such procedure would violate the constitutional rights of the accused inasmuch as he would be tried upon an indictment different from that found by the grand jury. Referring to *Breinig* v. *State, supra*, Jones, J. (who wrote both opinions) remarked: "It is clear that venue has no connection with the substance, identity or character of the offense." 125 Ohio St. 257, 264. See *State* v. *Whitmore et al.*, 126 Ohio St. 381, 185 N.E. 547, 37 Ohio L.R. 560, 128 Ohio St. 497, 40 Ohio L.R. 650 (1933), citing and approving *Breinig* v. *State, supra*. Then, in *Bryant* v. *State*, 48 Ohio App. 208, 16 Ohio L. Abs. 335, 1 Ohio Op. 179 (1933), the court permitted an amendment changing an allegation in the indictment from murder "while in perpetration of a robbery," to "while attempting to commit robbery," holding that this did not change the name or identity of the crime within Section 13437-29. So too, in *Roberts* v.

[16] Mass. Acts and Resolves 1926, c. 227, sec. 35a.
[17] Deering Cal. Penal Code, sec. 835, and sec. 1008 (1931).
[18] Mich. Comp. Laws 1929, sec. 17290. See footnote 13, *supra*.
[19] Section 13437-29. See notes 1 and 6, *supra*.

State, 45 Ohio App. 65, 186 N.E. 748, 38 Ohio L.R. 299, 13 Ohio L. Abs. 566 (1932), where the indictment charged the accused as a "deputy clerk," it was held permissible to amend the charge to read "employee," the offense being acceptance of a bribe by a public official. The court held that this was not a change of the identity of the crime, nor a surprise or prejudice to the defendant. The last reported case in point from Ohio is *State* v. *Foster*, 56 Ohio App. 267, 10 N.E. (2d) 786, 23 Ohio L. Abs. 278, 9 Ohio Op. 363 (1936), wherein the court held that it was not error to amend an indictment by inserting the word "motor" before the word "truck" where the charge was driving a motor vehicle while intoxicated, in order to put the indictment in the words of the statute, the court resting four-square on Section 13437-29.

Thus it would seem that, today, the Ohio courts at least, would permit amendment of indictments as to matters either of form or substance, so long as no prejudice accrues to the defendant, nor any change in the nature or identity of the crime is made. The great weight of authority is firmly *contra* regarding matters of substance, and squarely in accord with reference to matters of form. And, from a summary of the more recent cases, it would seem that the time of the making of the amendment is not restricted to the pleading before trial, but may include "any time," as is expressly stipulated in sec. 13437-29, *supra*. *People* v. *Milligan*, 247 Pac. 580, 77 Cal. App. 745 (1926); *People* v. *Winthrop*, 88 Cal. App. 591, 264 Pac. 263 (1928); *Breinig* v. *State*, *supra*. However, judging by all the cases, clearly the great weight of authority restricts amendments to the time preceding trial. (Clark, Crim. Proc. 2d ed. 365). Informations are, by the great weight of authority, amendable at any time. *Ables* v. *State*, 35 Okla. Cr. 26, 247 Pac. 423 (1926); *Robards* v. *State*, 37 Okla. Cr. 371, 259 Pac. 166 (1927); *State* v. *Stebbins*, 29 Conn. 463, 79 Am. S. Rep. 223 (1861).

Insofar as affidavits are concerned, it may be flatly stated that their amendability is nil, the courts unanimously holding that, although an affidavit is amendable in civil proceedings,[20] no such privilege obtains to these documents in criminal cases where the cause is predicated thereon. *City of Toledo* v. *Harris*, *supra*. In *Diebler* v. *State*, 43 Ohio App. 350, 183 N.E. 84, 37 Ohio L.R. 232 (1932), the court, being confronted with Sections 13433-2 and 13433-3 of the Ohio Gen. Code,[21] ruled that these stipulations must be strictly construed, and consequently held that the court or magistrate has no power to amend affidavits. "No court

[20] Ohio Gen. Code 11363; 1 Ohio Jur. 600, sec. 8. See *Moorehead* v. *Briggs, Adm'r.*, 152 Ill. App. 361 (1910), holding that affidavits cannot be amended by erasures and interlineations.

[21] Note 6, *supra*. See also, *Dennis* v. *State*, 28 Ohio N.P. (N.S.) 392 (1931).

or public officer has authority to force an individual to say something different from what that individual actually did say or express a willingness to say." Reiterating this statement, the court in *Snyder* v. *State, ex rel. McCoy*, 53 Ohio App. 370, 4 N.E. (2d) 944, 4 Ohio Op. 537, 20 Ohio L. Abs. 292 (1935), held that an affidavit is the act of an individual and cannot be amended or changed without a new verification by the affiant; and added that Sections 13437-7 and 13437-29 exclude, by implication, affidavits from their scope. The court in *In re Bonanno*, 28 N.P. (N.S.) 527, 9 Ohio L. Abs. 521 (1931), upheld a reduction of a charge based on an affidavit, by virtue of sec. 13433-3, from felony to misdemeanor in accordance with the facts and the evidence, but did not mention the amendability of the affidavit itself.[22]

In all instances it is important to distinguish statutes of amendment from statutes of jeofails. The former authorize the curing of defects by amendments actually made in the record, whereas the latter direct the court not to recognize the defect(s) after a time or step mentioned. (Clark, Crim. Proc. 2d ed. 373).

In summarization, it is only necessary to set forth the salient and opposing arguments on the question of amendment of indictments and affidavits. Some few of the courts, including Ohio, urge a freer amendability of these instruments of procedure, citing the practical expediency of such a course. Opposed to this legislation is the constitutional and individual rights argument, which, in effect proclaims that to permit amendment of indictments and affidavits as to substance is to prejudice the accused and deprive him of his constitutional right to a formal accusation by a grand jury on oath, and the corollary assurance against deprivation of life, liberty or property without due process of law. These objections do not, of course, obtain to prosecution by information. On the other hand, where prosecution is by affidavit, still another objection is raised, *viz.*, that against putting words into an affiant's mouth which he did not say and might be unwilling to say. The writer, with deference to opposing views, submits that the objections to freer amendability of criminal pleadings are, in his estimation, superior to the arguments raised in defense of such legislation, and that amendment of indictment and affidavit as to matters of substance ought not be permitted, as being violative of the constitutional rights of the accused.

ROBERT H. JONES

[22] See also, *Ingham* v. *State*, 35 Ohio App. 311, 172 N.E. 401 (1929).